Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

C. GREGORY EARLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Particularly when considered as part of a recent trend of Second Circuit cases coming before it, should the opinion below be reviewed to determine whether the Second Circuit has now adopted such a vigorous and automatic "policy of inclusion" of any prior act evidence offered under Rule 404(b), that it allows such evidence even where *it is explicitly offered to show propensity*, and where its admission is not otherwise justified by any relevant purpose sanctioned by the Rule.

II. In this investment-fraud case, where petitioner Earls was charged with theft of investment monies from one specific venture (and no others), was Rule 404(b) disregarded in such a flagrant manner that this Court's review is required where, instead of limiting the evidence to any proof that petitioner stole the investment monies he had raised for the investment partnership as charged in the indictment, the Circuit Court affirmed, in a manifestly insouciant summary opinion, the following character/propensity assault on defendant:

(a) the district court allowed the prosecutors to introduce a torrent of evidence about "victims" of petitioner's past investment ventures that were not charged in the indictment, including 250 pages of testimony and 66 separate exhibits; and

(b) the district court itself questioned Earls extensively about these past ventures, and allowed the prosecutors to repeatedly refer to these uncharged investments as "past schemes," refer to the investors in them as "victims," show that many of these past investors had sued Earls on these past, uncharged investments, and even allowed the prosecutors to argue in closing that appellant Earls was guilty *on the charged scheme* because his "past schemes" showed

that "*he has done investment schemes like this before;*" and

(c) the district court allowed extensive evidence that appellant Earls had made various pledges to charities and then reneged on those pledges, and then allowed the prosecutors to elicit the testimony from one witness *that he (the witness)* had never reneged on any of *his* pledges to charities, in order to juxtapose that witness' having paid pledges as promised with appellant Earls' failure to pay as promised.

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MISCELLANEOUS:

MUELLER and KIRKPATRICK, Federal Evidence, § 100 (Lawyer's Coop. Pub. 2d. Ed. 1994) 25, 25n

Professor Edward J. Imwinkelried, The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine, 50 Mo.L.Rev.1 ..... 24n

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit affirming the District Court's Judgment and Conviction is found in the Appendix ("App.") 1a-5a. The Order denying the rehearing is found at App. 6a. Various excerpts of the trial transcript showing what we contend to have been the unwarranted questioning about the propensity evidence by the Court itself are found at App. 8a through App. 11a.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals and its judgment were entered on December 7, 2005. (App. 5a) A timely petition for rehearing was denied February 22, 2006. (App. 7a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

FEDERAL EVIDENCE RULE INVOLVED

Rule 404(b) of the Federal Rules of Evidence provides in pertinent part as follows:

> **(b) Other Crimes, Wrongs, or Acts.**-- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

STATEMENT OF THE CASE

I. Overview of the Charges, Earls' Defense, and the Other Act Evidence At Issue

A. *The State of the Stock Market*

The Indictment alleged that Earls and other investors formed "USV Partners" in 1998-99 and invested $20,000,000.00 in it so that Earls, as the general partner, could buy shares in U.S. Technologies, a publicly-traded company the stock of which was on the rise as part of the pre-2000, high-tech stock "bubble." *See*, Second Circuit Appendix ("A") 23. This high-tech "bubble" was, according to a government witness:

> . . . a time when almost every internet company that was ever formed went public on a wing and a prayer and they got tremendous valuations . . . and greed was running rampant on Wall Street and Main Street at that time.

[Trial Transcript "Tr." 1484] While the bubble still grew, Earls was the hero because the stock of U.S. Technologies he had purchased for his USV Partners skyrocketed.

In 2000, these "tremendous" valuations "started to decline precipitously" in the words of the same government witness. [Tr. 1485] The Second Circuit itself has noted "many technology companies that did not survive the bursting of the technology bubble during 2000." *P. Stolz Family Partnership L.P.* v. *Daum*, 355 F.3d 92, 95 (2d Cir. 2004).

When the bubble burst, unfortunately, the *normally-applicable*, legal restrictions prevented the USV Partners investors from selling their U.S. Technologies stock, even as they watched its value crater. For example [Tr. 1991]:

> So here's [INVESTOR] Warren. His stocks are at $12 million, he wants to hit the bid. I don't blame him, everyone would like to do that, but we were restricted. I had nothing to do with it, these were the security laws. I have to abide by them, everyone had to abide by them. So people were frustrated . . . they could not sell.

Earls became the goat.[1] The charges followed.

B. *The Charges in the Indictment*

The charge was that Earls, as general partner for USV partners, raised $20,000,000.00 to buy US Technologies stock and then stole $13.8 million of that:

> Earls engaged in a scheme to defraud investors of USV Partners, a company he controlled, by falsely representing that the company would use funds raised from investors to capitalize U.S. Technologies, a company of which he was chairman and CEO . . . [and then] misappropriated approximately $13.8 dollars . . . and used those funds for various undisclosed purposes, including to fund an educational trust for his children, to repay investors from other failed ventures, and to make deposits into his personal accounts.

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[1] Federal law unarguably prevented for two years the resale of the newly-issued stock series purchased for most of the investors. As was acknowledged at sentencing, "COUNSEL: The shares were restricted. THE COURT: Yes. That is the problem." Sent. Tr. pp. 5 and 6. So Earls' hands were tied. He could not sell while the bubble burst and the stock slid.

(A 25-26) The prosecutor repeatedly told the jury that (Tr. 2405):

> This case is about what Mr. Earls told [USV Partners] investors he was going to do with the money and what he actually did with the money.

The District Court saw the case exactly the same way (Tr. 2115):

> The fraud here concerns making representations about what investments were going to be used for and not using the money for that purpose.[2]

C. *Earls' Defense*

Earls' defense was, simply put, that he did not steal the money. Instead, Earls testified that he had used $20,000,000.00 to buy the stock as promised and that he had the share certificates to prove it, ready to sell once the securities law would allow those sales. He pointed out that the audited financial records offered as exhibits by the government showed that it was impossible for him to have stolen this money since they showed that it had gone where promised. He also pointed out that before the bubble burst, everyone wanted more and more because the stock, while

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[2] The supposedly missing $13.8 million dollars was thus the central charge, as the indictment and the comments of the court and the prosecutor make clear. Yet it was also alleged that he had made other, minor embellishments about who the investors would be and exaggerated the worth of the stock to be purchased. Two counts charged related frauds against specific investors. But as the trial progressed, these peripheral allegations played virtually no role, as the court and the prosecutor stressed that: "This case is about what Mr. Earls told [USV Partners] investors he was going to do with the money and what he actually did with the money." See text.